APPEAL NO. 93465

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on April 8 and 9, 1993, with the record being closed on April 26, 1993. (hearing officer). presided as hearing officer. The hearing officer determined that the respondent (claimant) sustained an injury in the course and scope of her employment on (date of injury), and that she has had disability from November 23, 1992 through the date of the hearing. Appellant (carrier) urges that the claimant failed to meet her burden of proof and that the hearing officer erred by finding a compensable injury. Carrier also urges error in the hearing officer's refusal to allow the carrier to recall a witness. Claimant asks that the decision of the hearing officer be affirmed.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer and determining that his findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

This was a relatively lengthy and vigorously contested case with a considerable amount of the evidence in conflict. The core of the case was whether the claimant sustained a compensable injury in the course and scope of her employment and whether disability resulted. The evidence, which included testimony and voluminous medical records, is fairly and adequately set forth in the hearing officer's decision and is adopted for purposes of this appeal. Succinctly, the claimant testified that she had suffered a job related back injury prior to January 1, 1991, ultimately underwent back surgery, and subsequently arrived at a settlement which included medical benefits well into 1994. She started work with the employer several days before (date of injury), when she was moving a rack of clothing that tilted and nearly fell over on her causing her to strain to hold it up. She cried out for help and a coworker came to her assistance and found the claimant struggling with the clothes rack. The claimant testified she felt a "snap" in her back, was in pain, was crying and was subsequently taken to the hospital. Other witnesses verified that they observed the claimant crying although none of them actually witnessed the accident. Extensive medical records were admitted covering both the pre- and post-(date of injury) time frame. Very briefly, various of the records detail the prior back injury and the extensive course of treatment following that injury, set forth the claimant's lingering problem with considerable pain, and indicate the claimant sustained a second injury that aggravated or exacerbated the prior back injury as a result of the (date of injury) incident. She underwent medical treatment which included injections into her back. The claimant testified that she tried to go back to work one day but was not able to work because of pain and that she has not been able to work since.

The carrier called several witness who indicated the claimant had complained to them of back pain prior to (date of injury) (specifically denied by the claimant who claimed she was basically healed from the prior injury), that the claimant had told them that she was

going to have to have a second back surgery and did not know how she would be able to manage it or how she was going to be able to pay for it (also specifically denied by the claimant). The carrier requested to briefly recall one of the witnesses, Donna Mikus (DM), but the request was denied by the hearing officer. Subsequently, it came out on the record through another witness that the matter the carrier apparently desired to cover was that DM had observed the claimant take a valium pill (apparently prescribed medication) while at work. The claimant had stated she did not take any medication at work. The hearing officer indicated that he did not feel that this matter would probably be given much weight in any event. The hearing officer's determination on the request to recall a witness was a matter for his sound discretion. While considerable latitude should be accorded in permitting a party to present its evidence, we do not find, under the circumstance present in this case, any prejudicial abuse of discretion. Even if we were to find any abuse, there is no reversible error present as there is no indication that any error in not allowing the recall of the witness was reasonably calculated to cause and probably did cause rendition of an improper decision. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 92369, decided September 10, 1992.

The hearing officer, as indicated, set out a fair and adequate statement of the evidence and discussed the positions of the parties as related to the evidence. The main thrust of the carrier's position, which was stated on the record several times, concerned the theory that the sole cause of the claimant's medical condition and inability to work was her prior back injury and that the incident of (date of injury) was staged. The hearing officer specifically found that two of the doctors who had seen or treated the claimant determined that "the claimant's injury of (date of injury) aggravated the pre-existing condition related to her prior injury" and that "as a result of the aggravation of her pre-existing condition due to the injury" of November 1992, she has disability. While case law recognizes that different inferences or conclusion may reasonably be drawn from the evidence and facts, such is not a sound basis for a reviewing body to substitute its judgment for that of the fact finder. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); Garza v. Commercial Insurance Co. of Newark N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992. The hearing officer, under the 1989 Act, is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Where there are conflicts and inconsistencies between and in the documentary evidence and testimony of witnesses, it is the hearing officer, as fact finder, who is charged with the authority and responsibility to resolve such conflicts and inconsistences. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. The hearing officer can believe all, part or none of the testimony of a given witness and can believe one witness and disbelieve others. *See*

Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Where there is a sufficient basis in the evidence to support

the findings and conclusions of the hearing officer, affirmance of the decision is appropriate. We find that there is evidence of a compensable injury that is not so weak or so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Accordingly, there is no basis to disturb the decision and it is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge